89-1764 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 Term

FRIEDA MILLER

vs.

PRUDENTIAL BACHE SECURITIES. INC.
AND SAMUEL KAPLAN

Petition for Writ of Certiorari on
appeal to U.S. Court of Appeals
for the Fourth Circuit

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(a) QUESTIONS PRESENTED FOR REVIEW

1. Is arbitration of a securities claim adequate under Shearson vs. Mc Mahon _____ US _____ 107 S. Ct. 2332, 2343 (1988) if the arbitration panel misapplies the rules of arbitration procedure mandated by the Securities Exchange Commission under 15 USC 78 s (b) (2) and 78 s (c) ?

2. Does an arbitration forum exceed the scope of its authority under 9 USC S 10 (d) when it misapplies the rules of arbitration procedure which the parties designated as controlling?

(b) LIST OF PARTIES

Frieda Miller
Petitioner

Prudential - Bache
Samuel Kaplan
Respondents

The undersigned counsel of record for the petitioner certifies that the above listed parties appeared upon the pleadings below:

Lois F. Lapidus

Lois F. Lapidus, Esq.
Attorney for Petitioner

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(d) REFERENCE TO OFFICIAL REPORT OF FOURTH CIRCUIT COURT OF APPEALS

U. S. Court of Appeals, Fourth Circuit, Miller v. Prudential Bache #88-2179 (1989)

(e) STATEMENT OF GROUNDS ON WHICH JURISDICTION IS EVOKED

1. Judgment entered by U. S. Court of Appeals, 4th Circuit, August 29, 1989.

2. Order of U. S. Court of Appeals denying rehearing October 10, 1989.

3. 28 USC 2101 (c), Federal Rules of Court, Supreme Court Rule 20 (2); and Rule 17 1(c).

(f) (1) STATUTORY PROVISIONS

Federal Statutes

(1) 9 USC Sec. 10 (d)

10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definate award upon the subject matter was not made.

(2) 15 USC Sec. 78 s (b)(1)

(b) Proposed rule changes; notice; proceedings.

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in the subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together

with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(3) 15 USC Sec. 78s (c)

(c) Amendment by Commission of rules of self-regulatory organizations. The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory

organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's.

f (2) REGULATORY PROVISIONS

NASD Code of Arbitration Procedure
Rule 15

3715 Time Limitation Upon Submission

Sec. 15 No dispute, claim or controversy shall be eligible for submission to arbitration under this Code if any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This Section shall not extend applicable statutes of limitations.

(g) STATEMENT OF CASE

1. Under a customer's agreement dated October 7, 1976, Appellee brokerage house commenced a relationship with Appellant whereby Appellee brokered the purchase and sale of naked options for Appellant on the Philadelphia, American, and Chicago Option Exchanges.

2. In May, 1978 Appellant sustained a loss of over one million dollars because she had to honor her option agreements by purchasing the underlying securities at a price higher than the optionee was required to pay under the option contract.

3. Appellant contends that her loss arose as a result of Appellee's deceptive and manipulative practices in violation of the Federal Exchange Act. S 10 (b) [15 USC 78 j (b)].

4. Paragraph 14 of the customer's agreement states as follows:

This contract shall be governed by the laws of the State of New York . . . . Any controversy arising out of or relating to my account, to transactions with or for me to this agreement or the breach thereof, shall be settled in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Govenors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration

facilities or under the rules of the American Arbitration Association as I may elect. (emphasis supplied)(lodging)

5. Neither the New York Stock Exchange nor the American Arbitration Association has a Baltimore Office or hears matters in Baltimore.

6. The American Arbitration Association does not specialize in settling disputes involving securities as do the option exchanges and the National Association of Securities Dealers (NASD).

7. After the loss occurred, Appellant wrote to the Securities Exchange Commission (SEC) to ascertain the best manner in which to enforce the anti-fraud rights conferred under the combined reading of 15 USC Sec. 78 f (b) (5) and the exchange rules. /1. (lodging)

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1. Appellant filed her claim with the NASD after the SEC recommended that forum.

8. The SEC refused to take jurisdiction of the factual dispute but directed Appellant to the National Association of Securities Dealers (NASD) and the stock exchange.

9. Pursuant to the SEC recommendation, Appellant filed a complaint about her May, 1978 financial losses with the NASD at its home office in New York in October, 1983 because she was advised that the NASD convenes hearings in Baltimore.

10. Under its Code of Arbitration the New York office of the NASD sent a representative to preside at an NASD hearing in Maryland in March of 1985 before NASD members. (lodging)

Appellee acquiesced in Appellant's choice of the NASD. It was certainly more convenient for Appellant to arbitrate her claim in Maryland than to travel to New York to appear before the New York Stock Exchange. There is no American Arbitration Association in Baltimore. At any rate there is no question that the NASD

11. There is no NASD procedural rules providing that if the NASD convenes a hearing in Maryland Appellant is subject to Maryland's statute of limitations. (lodging)

12. There is no NASD procedural providing that the claim is subject to limitations of the claimant's domicile.

(g) STATEMENT OF JURISDICTION OF 4TH CIRCUIT COURT OF APPEALS

9 USC Sec. 10 (d) (P iv)

(j) ARGUMENT

I. Arbitration is inadequate under SHEARSON VS. MCMAHON.

Footnote 1 continued

was more qualified to hear a complicated securities claim than the American Arbitration Association which settles mainly contract disputes. The SEC did not inform Appellant of the arbitration facilities of the option exchanges where the transactions were executed.

McMahon upholds arbitration clauses before self-regulating organizations (SRO), like the NASD, because the Congress directs the SEC to superintend arbitration before these bodies through the rules governing arbitration procedures. In light of the Exchange Act's statutory provisions directing SEC supervision of SRO rule making authority, the Supreme Court is assured that "arbitration procedures adquately protect statutory rights".

In Shearson/American Express, Inc. vs. McMahon, _____ U. S. _____, 107 S. Ct. 2332 at 2343 this court said:

Thus, the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. Even if Wilko's assumptions

regarding arbitration were valid at the time Wilko was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority. In 1953, when Wilko was decided, the Commission had only limited authority over the rules governing self-regulatory organizations (SROs) - The national securities exchanges and registered securities associations - and this authority appears not to have included any authority at all over their arbitration rules. See Brief for the Curiae 14-15. Since the 1975 amendments to Sec. 19 of the Exchange Act, however, the Commission has had expansive power to ensure the adequacy of the arbitration procedures employed by the SROs. No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 USC Sec. 78 s (b) (2); and the Commission has the power on its own initiative, to "abrogate, add to, and delete

from" any SRO rule if it finds such changes necessary or appropriate to further the objectives of the Act, 15 USC Sec. 78 s (c). In short, the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adquately protect statutory rights. (footnote omitted) (emphasis supplied)

Appellant's statutory rights are not adequately protected if the arbitration panel defies its Code of Arbitration Procedure whose adoption the SEC mandated. McMahon requires a reviewing court to ensure that arbitrators comply with the requirements of the statute. Shearson vs. McMahon at 2342. If the statutorily approved rules are not applied in accordance with their express intent, the requirements of the securities statute have been undermined. Arbitration is inadequate when an arbitration rule is not

applied in accordance with the basis upon which the SEC mandated adoption.

Tne SEC approval of Rule 15 is based on its understanding that six years is allowed for a claim provided the statute of limitations in the filing jurisdiction , for the cause of action alleged is not extended. This means contract and tort actions are governed by corresponding limitations of the jurisdiction where the claim is filed. There is no concern for instances in which a forum convenes outside the filing jurisdiction because of the general rule that limitations of the jurisdiction in which the action orginates controls. Berry vs. Adams, 158 F 2nd 402 (2nd Cir. 1975).

Here we know that the SEC believed the filing of Appellant's fraud action would not extend the six years prescribed under NASD Procedural Rule 15. The SEC recommended that Appellant file her 10 (b) fraud claim with the NASD in November, 1983. Presumably the SEC was familiar with the six year statute

of limitations for fraud of the New York based NASD. The six years would have expired in May, 1984, well beyond its recommendation of filing in December, 1983.

The SEC advised that the situation would be "carefully considered from the stand point of our (SEC) enforcement and regulatory responsibilities under the Federal Securities Law".

The agency enclosed a booklet explaining arbitration facilities entitled "ARBITRATION PROCEDURES" containing a rule identical to NASD rule 15. There is nothing in the booklet or NASD Rule 15 to warn claimant that if she filed in New York but a hearing is convened in Maryland for her convenience, Maryland statutes of limitations control. There is nothing in the booklet or NASD Rule 15 advising that the New York borrowing statute has been adopted by the NASD and approved by the SEC.

The decision conflicts with well established precedent. It is well established that the statute of limitations of the forum state

applies to 10 (b), [15 USC Sec. 78 j (b)] claims. Ernst & Ernst vs. Hochfelder, 425 US 185, 210 1976. In affirming the dismissal of the arbitration claim of this fourth circuit resident for filing beyond the period allowed by her domiciliary statutes of limitations, the fourth circuit creastes an anomaly. All the SROs have promulgated statutes of limitations rules comparable to Rule 15. Thus complainants residing in other jurisdictions are permitted to arbitrate within the general rule subjecting claimaints to limitations of the forum state whereas arbitration claims of fourth circuit residents are subject to limitations of their domicile.

Assuming the arbiters relied upon Maryland statute of limitations to bar the claim because the arbitration convened there, a similiar deviation from well established precedent is created. There is no dispute that the forum in which the action originates controls for limitation purposes not the forum conveniens. Berry vs. Adams, 518 F 2nd 402 (2nd Cir. 1975).

McMahon makes adherence to arbitration rules a prerequisite for the adequacy of the arbitral system. The parties stipulated to no less. Implied in McMahon is Congress' knowledge of the salubrious Arbitration Act assuring that the arbitrators do no exceed powers granted them by the parties. McMahon has to be read in light of Exchange Act commands requiring SEC supervision of SRO procedural rule making authority and the Arbitration Act's Section 10 (d) assuring judicial scrutiny of arbitration panels which exceed their authority under such rules. The fourth circuit decision presently undermines the guarantees that permitted the Supreme Court to trust the adequacy of arbitration. As such it defies an applicable decision of this Court under Supreme Court Rule 17.1 (c) and the Federal Arbitration Act.

II. THE ARBITRATORS EXCEEDED THEIR POWERS AND IMPERFECTLY EXECUTED THEM WITHIN THE MEANING OF 9 USC SEC. 10 (d).

Section 10 (d) provides for the vacation of an arbitral award,

* * *

> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final, and definate award upon the subject matter submitted was not made.

The parties' arbitration clause provides:

> 14. This contract shall be governed by the laws of the State of New York . . . . Any controversy arising out of or relating to my account, to transactions with or for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance

with the rules then obtaining of either the American Arbitration Association or the Board of Govenors of the New York Stock Exchange as I may elect. (emphasis supplied)

Ignored is the fact that the contract is subject to the laws of New York but the arbitration is subject to the rules of the arbitration forum. Thus the choice of law clause controls the contract not the arbitration procedure. The parties expressly limited the arbitrators' power to decide the dispute under the NASD rules of procedure not New York law. Rule 15 makes no reference to the limitations applicable in the claimant's domicile. NASD Manual - Code of Arbitration Procedure Sec. 15 states:

Time Limitation Upon Submission

> Sec. 15. No dispute, claim or controversy shall be eligible for submission to the arbitration under this Code in any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations. (APX.)

The arbiters might have thought the claim was barred because of the New York borrowing statute appearing in New York Consolidated Laws Service, Annotated Statutes with forms, 1978 edition, as amended, Volume 4A Civil Procedure Law and Rules (CPLR) Sec. 202 which provides:

> An action based upon a cause of action accuring without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the

> the state where the cause of action accured, except that where the cause of action accured in favor of a resident of the state time limited by the laws of the state shall apply.
>
> Advisory committee notes:
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> . . . . It is unnecessary to state as does (CPA Section 13, [earlier statute] that the limitation applied only to actions brought in a court of this state since the article purports to cover only such actions. (emphasis supplied)

Since Appellant is not a New York resident and suffered her loss in Maryland, the New York borrowing statute would bar her claim if it "extends applicable statutes of limitations" under the NASD's Sec. 15. Apart from the critical fact that a borrowing statute does not operate by being "extended", the phrase says "applicable statutes of limitations"

not applicable law. Nor does the rule say statutes of limitations applicable to the claimant. The use of the plural "statutes" obviously refers to the various statutes of limitations corresponding to different causes of action which can accrue.

It is worth remembering that the arbitration panel was authorized to settle the dispute according to its rules. The borrowing statute operates by borrowing not extending the statute of limitations of the jurisdiction of the non-resident. It is the borrowed statute of limitation which the lower court says would be extended if the arbitration were to proceed. To reach the non-domicile's statute of limitations the rule should say this section shall not [extend statutes of limitations applicable to claimant]. Thus the arbitration panel imperfectly executed and exceeded its authority under the agreement and under its rules if it went outside the

contract and the controlling NASD rule to interpolate New York's borrowing statute into the arbitration proceeding. It is also clear from the New York Statute's Committee Note that the borrowing statute is applied only in court proceedings not non-statutory arbitration matters over which the New York courts have no jurisdiction.

Under the New York Arbitration law statutory arbitration must be initiated in a court by application. New York CPLR, Vol. 4 L, Arbitration, Sec. 7502. (lodging) The parties agreed to non-statutory arbitration. The borrowing statute was never germane to the arbitration because no court ever had jurisdiction over the arbitration. Here the parties specified that the arbitration tribunal's rules shall be relied upon exclusively to settle disputes. There is no provision for reliance upon New York CPLR sections 202 or 7502. The deciders here insinuated

material dehors the contract to reach their conclusion. The rules of the arbitration forum which the parties intended to control the arbitration just do not provide for the governance of the New York borrowing statute in this arbitration. The arbitrators simply rewrote the parties' agreement and Rule 15 which is unlawful under 9 USC Sec. 10 (d). Local Union 566 vs. Orange and Rockland 510 NYS 2nd 671 (1987) (By construing agreement to require employees to submit disability claims, including doctor's certificates to qualify for sick leave benefits, arbiters modified terms of agreement in contravention of express limitation of their authority); In the Matter of New York City Transit Authority v. Patrolmen's Benev Association, 514 NYS 2nd 470 (1987) (Arbitor's consideration of past practices between New York parties, which had not been formally written into a working condition, rule or regulation,

violated power to interpret and apply provisions of agreement or written condition, rule, or regulation); Board of Education vs. North Babylon Teachers Organization 479 NYS 2d 536 (1984). (When limitation of arbitrator's power is contained in the agreement, vacatur is appropriate to prevent a rewriting of contract); Pavillion Cent. Sch. Dist. v. Pavillion Fac. Ass'n. 380 NYS 2d 387 (1976). (If an arbitrator rewrites the parties' contract by an irrational construction of the contract's provisions, there is an abuse of power sufficient to vacate the award.)

Arbitration is not adequate if the arbitrators are allowed to exceed the scope of their powers because the courts will not apply 9 USC Section 10 (d) of the Arbitration Act. The securities industry will be advantaged by a judicial willingness to construe arbitral excesses as discretionary acts not subject to review. Given this judicial lack of will, securities professionals who serve as arbiters

on SROs are able to protect their colleagues and compound the industry abuse being discovered daily by the media and government attorneys. All disputes filed beyond the statute of limitations applicable to claimant will be dismissed without reaching the merits of the abuse claimed. The public is abandoned when the courts do not apply 15 USC 78s (b) (1) and (c) as Congress intended. (P_V)

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 Term

FRIEDA MILLER

vs.

PRUDENTIAL BACHE SECURITIES, INC.

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2179

FRIEDA MILLER

Plaintiff - Appellant

v.

PRUDENTIAL-BACHE SECURITIES, INC.;
SAMUEL KAPLAN

Defendants - Appellees

On Petition for Rehearing with Suggestion

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for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin with the concurrence of Judge Chapman and Judge Kaufman.

For the Court,

_____

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2179

Frieda Miller, Plaintiff-Appellant,

versus

Prudential Bache Securities, Inc.,
and Samual Kaplan, Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, Baltimore Division.
Herbert F. Murray, United States District
Judge. (CA No. 85-4264)

Argued: May 8, 1989 Decided: August 29, 1989

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Lois F. Lapidus)LAPIDUS & LAPIDUS on brief) for Appellant.

Maurice Robert Dunie (Patricia E. Connelly, BULMAN, DUNIE, BURKE & FELD, CHARTERED on brief) for Appellee.

ERVIN, Chief Judge:

Frieda Miller appeals from a grant of summary judgment in favor of Prudential Bache Securities, Inc. on her motion to vacate an arbitrator's award. The district court found that the arbitrator's decision regarding the applicable statute of limitations is not subject to review in the federal courts. The lower court also held that the arbitration clause itself does not constitute an invalid waiver of appellant's rights, and that it was not fraudulently induced. We agree, and affirm.

In October, 1976, the plaintiff-appellant, Frieda Miller, entereed into a written "customer agreement" with defendant-appellee Prudential Bache Securities ("Bache") for investment in "naked options."[1] The agreement contained

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[1] In a naked option transaction, one party sellsto another options contracts, granting

the buyer the right to purchase a particular stock at a price lower than the current trading price of that security. The seller of the option, however, does not own the underlying stock. Therefore, if the purchasing party elects to exercise his option, the seller is required to purchase the stock, usually at a higher price than the optionee is required to pay.

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an arbitration clause, which provides in relevant part:

> Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions

in commodities or contract relating thereto, whether executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilites or under the rules of the American Arbitration Associat as I may elect.

In May, 1978, Miller sustained losses in excess of one million dollars as a result of her trading in naked options. In December 1983, Miller filed an arbitration claim with the National Association of Securities Dealers ("NASD"), a New York based organizaton. Bache acquiesced to Miller's wish to file with NASD, rather than one of the organizations specified in the contract. Miller's decision

was apparently prompted by the fact that the NASD would hold hearingins in Baltimore, her city of residence, whereas neither the New York Stock Exchange ("NYSE") nor the American Arbitration Association would.

A hearing was held before five NASD arbitrators in June, 1985. The arbitration panel unanimously granted appellees' motion to dismiss the claims, on the grounds that they were barred by Maryland's three year statute of limitations period. Although their decision did not specifically say so, apparently the arbitrators applied Maryland's statute of limitations after applying New York's "borrowing statute," which provides:

> An action based upon a cause of action accrusing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where

> where the cause of action accrued, except that thwere the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

N.Y. CPLR & 202.

Miller subsequently filed an Application to Vacate the Arbitrator's Award in the United States District Court for the District of Maryland. The lower court granted summary judgment against Miller on the grounds that the arbitrator's decision contained no basis for vacating the dismissal, and that there existed no evidence to support Miller's assertion that the arbitration clause itself was void.

I. The Arbitrators' Award

Miller seeks to have the panel's decision vacated under 9 U.S.C. & 10(d), which provides that an arbitrtion award may be set aside:

> Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Miller contends that the arbitration panel exceeded the scope of its authority by relying on the New York borrowing statute to determine the applicable statute of limitations period. She claims that, in the event of arbitration, the parties contemplated that the arbitrating body would apply its own procedural rules. Miller also asserts that the stipulation that New York law would govern the customer agreement referred only to matters of substantive law, and that therefore the parties did not intend their choice of law provision to include New York's borrowing statute. Instead, Miller argues, the panel should have used the NASD's rules to determine the timeliness of her action. Under those rules, which allow six years

to begin arbitration provided "no extension of [the] applicable statute of limitations occurs," Miller would have been allowed to proceed with her action.

Miller further argues that even if the choice of law provision did include the borrowing statute, that statute cannot apply to "non-statutory" - i.e., privately agreed upon - arbitration, under the provisions of the New York Arbitration Article.

Finally, Miller asserts that if the panel reached the Maryland statute of limitations through Rule 15 of the NASD Code of Arbitration procedures, the arbitrators still exceeded their authority. Rule 15 provides:

> No dispute, claim or controversy be eligible for submission to arbitration under this Code in any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act

or dispute, claim or controversy.

This section shall not extend

applicable statutes of limitations.

Because the parties contemplated that the panel would apply its own procedural rules, Miller reasons, the applicable statute of limitations is in fact the six year period provided for in Rule 15. Furthermore, Miller claims, even if Rule 15 was intended to incorporate state statutes of limitations, the correct limitations period in this case is that provided by New York -- six years. Miller asserts that the New York limitations period would apply here because the NASD is a New York based organization, and that therefore the "situs" of the arbitration forum was New York.

Miller'a argument that the panel erroneously applied the Maryland statute of limitations amounts to an assertion that the panel either: (1) misinterpreted the customer agreement, by holding that the choice of law clause

incorporated the borrowing statute; (2) misapplied the borrowing statute; or (3) misinterpreted its own rules by holding that the "applicable statute of limitations" referred to in Rule 15 included, in this case, the Maryland statute. Even if it exists, however, such misinterpretation or misapplication simply does not constitute grounds for vacating an arbitrator's decision.

Over three decades ago, the Supreme Court held that a contention that "the arbitrators misconstrued a contract is not open to judicial review" under § 10(d) of the Federal Arbitration Act. Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 203 n.4, 100 L.Ed. 199, 205 n.4 (1956). The federal courts, including this one, have unwaveringly followed this rule, and have consistently held that contract misconstruction is an insufficient basis for vacating an arbitration award. See, e.g., National R.

R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 142 (7th Cir. 1977)(arbitrators do not exceed their powers by misconstruing a contract, even if their interpretation is, in the eyes of the reviewing court, clearly erroneous); Textile Workers Union of America v. American Thread Co., 291 F.2d 894, 896 (4th Cir. 1961)(misinterpretation of the contract giving rise to the arbitration will not vitiate the award).

Even if Miller's argument is that the panel either misinterpreted or misapplied the applicable law - in this case either the borrowing statute or Rule 15 - there still exists no basis for overturning the panel's decision. Once again, federal courts have consistently held that they will not "set aside an arbitrator's award for mere errors of law." Textile Workers Union of America, supra, at 896. See also Revere Copper and Brass, Inc. v. Overseas Inv. Corp., 628 F.2d 81 (D.C. Cir. 1980)(arbitrators'

award will not be set aside for failure to apply the traditional rules of contract construction); Office of Supply, Gov. of Republic of Korea v. New York Naval Co., 469 F.2d 377, 379 (2d Cir. 1972)("An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law."); National R. R., supra, at 143 ("It is well settled that an arbitrators' award will not be vacated on the grounds that the arbitrators misinterpreted applicable law.").

II. Validity of the Arbitration Agreement

Miller next contends that the arbitration agreement itself is void, because it constitutes an illegal waiver of her substantive rights to the protection of the anti-fraud rules the exchanges are required to promulgate under the 1934 Securities Exchange Act ("the 1934 Act"), 15 U.S.C. & 78. Section 78f(b)(5) of Title 15 requires all national

securities exchanges to promulgate rules "designed to prevent fraudulent and manipulative acts and practices," and to "protect investors and the public interest." Section 78cc(a) of Title 15 provides:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

The transactions underlying the dispute in this case occurred on the Chicago and Philadelphia option exchanges. The Chicago exchange's anti-fraud provision is Rule 9.7 (c) of the exchange, which states:

> Within 15 days after a customer's account has been approved for options transactions, a member

> organization shall obtain from the customer a written agreement that the account shall be handled in accordance with the Rules of the Exchange and the Rules of the Clearing Corporation and that such customer, acting alone or in concert with others, will not violate the position or exercise limits set forth in Rules 4.11 and 4.12.

Miller argues that because the arbitration clause did not expressly provide that disputes would be handled in accordance with the anti-fraud rules of the options exchanges - as opposed to the commodities exchanges - it failed to satisfy the "written agreement" requirement of Rule 9.7. Therefore, she claims, the agreement amounted to a waiver of her right to the protection of 15 U.S.C. & 78f(b)(5), which requires the promulgation of the anti-fraud rules.

Miller also asserts that the NASD rules themselves preclude the application of any anti-fraud provisions. The NASD's anti-fraud rules are set forth in Appendix E of the NASD Manual - Rules of Fair Practice. The applicability provision of these rules states:

> The Rules in this Appendix E shall be applicable (1) to the extent appropriate unless otherwise stated herein, to the conduct of accounts, the execution of transactions, and the handling of orders in exchange listed options by members who are not members of an exchange on which the option executed is listed; (2) to the extent appropriate unless otherwise stated herein, to the conduct of accounts, the execution of transactions, and the handling of orders in conventional options; and (3) other matters related to options trading.

Miller claims that because Bache is a member of the Chicago and Philadelphia options exchanges, the NASD anti-fraud rules cannot apply to her action. Furthermore, because the agreement provides that arbitration will be handled in accordance with the rules of the arbitration forum - in this case the NASD - it also precludes the application of the Chicago and Philadelphia exchanges' anti-fraud rules.

The Supreme Court recently held that a predispute agreement to arbitrate claims arising under the 1934 Act does not violate 15 U.S.D. & 78cc, and will be enforced, provided that arbitration will be adequate to vindicate a plaintiff's rights under the 1934 Act. See Shearson/American Express, Inc. v. McMahon, _____ U.S._____, 107 S.Ct. 2332, 2343, 96 L.Ed.2d 185, 199 (1988). The district court found that the arbitration clause in questions met this test, as it did not waive

any of the substantive rights afforded Miller by the 1934 Act. We are persuaded by the district courts rationale, and we adopt it here. The court first found that the provision that arbitration was to be conducted in accordance with the rules of the arbitration forum governed only arbitration procedure, and "not the substantive rules that may bear on the merits of the underlying dispute." Thus, if Bache's conduct violated the anti-fraud provisions of either the Chicago or the Philadelphia option exchanges, the NASD panel would have been free to consider that fact. The court further reasoned that the possible inapplicability of the NASD anti-fraud rules to Bache because of its membership on the Chicago and Philadelphia exchanges would not preclude the NASD panel from considering the Chicago and Philadelphia anti-fraud rules when adjudicating a claim.

Finally, the court observed that the arbitration agreement itself expressly provides

for "arbitration in accordance with the rules when obtaining of either the American Arbitration Association or the Board of Governors of the [NYSE]". There is no evidence that the rules of either of those organizations would interfere with Miller's right to the protection of the option exchanges' anti-fraud rules. Thus, we agree with the lower court's conclusion that "neither the arbitration clause as originally written nor the subsequent agreement to submit the dispute to the NASD operated as a waiver of [Miller's] right to the protection of the anti-fraud rules."

We also note that at least two other cases, including McMahon, have upheld the validity of arbitration clauses virtually identical to the one at issue in this case. Although those cases did not expressly address the question of whether the arbitration agreement waived a customer's rights under the 1934 Act, the fact that those clauses were deemed

sufficient to vindicate the plaintiff's rights under that statute, and were therefore enforceable, is instructive. In McMahon, the arbitration clause provided that all disputes "shall be settled by arbitration in accordance with the rules, then in effect, of the [NASD] or the Board of Directors of the [NYSE] and/or the American Stock Exchange, Inc., as [the customer] may elect." 96 L.Ed.2d at 191. In Phillips v. Merrill Lynch, Pierce, Fenner and Smith, 795 F.2d 1397 (8th Cir. 1986), the Eighth Circuit enforced an arbitration clause in an "Option Agreement" which stated that any controversy would be settle by arbitration before the NASD, the NYSE, or "an Exchange located in the United States upon which listed options transactions are executed."

Miller also argues that the arbitration agreement is void because it was procured by fraud on the part of Bache. Miller bases her claim of fraudulent inducement on Bache's failure to advise her of: (1) the Wilko doctrine,

holding that predispute agreements to arbitrate a claim under the Securities Act of 1933 are enforceable, Wilko v. Swann, 346 U.S. 427 (1953); (2) the rules of the various options exchanges and their arbitration facilities; and (3) the existence of the NASD. Miller sought discovery of documents to prove Bache's failure to provide information regarding these subjects, but Bache refused to cooperate and the district court denied Miller's motion to compel discovery of the material.

The district court rejected Miller's assertion that Bache's failure to advise her in any of these three areas constituted potential grounds for a fraudulent inducement claim. Once again, we find the reasoning of the district court persuasive.

With respect to the Wilko doctrine, Jude Murray held that even if Bache was required to provided Miller with legal advice, it was certainly under no obligation to advise her of a legal doctrine whose applicability to

her situation "was at best questionable." At the time the contract in question was made, the Supreme Court had yet to rule that claims arising under the 1934 Act could be subject to a predispute agreement to arbitrate.

Additionally, the district court found that Bache had no duty to advise Miller of either the rules of the various option exchanges and their arbitration facilities, or the existence of the NASD. The court noted that there existed no evidence as to how this information would have affected Miller's decision to accept the arbitration agreement.

Finally, and most persuasively, Judge Murray pointed out that Miller herself chose the NASD as the arbitration forum. Because this was not one of the forums specified in the arbitration clause itself, we agree with the district court that,"[i]t is therefore difficult to perceive how she was fraudulently induced to submit to arbitration before the NASD panel when she elected it."

For the reasons set forth above, the decision of the district court granting summary judgment in favor of Prudential Bache Securities, Inc. and Samuel Kaplan[2] is hereby

AFFIRMED.

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[2] Samuel Kaplan is the former Bache employee who handled Miller's accounts with the firm. Miller filed a single action against both Bache and Kaplan.

IN THE UNITED STATES DISTRICT

FOR THE DISTRICT OF MARYLAND

FRIEDA MILLER	*	
v.	*	CIVII
PRUDENTIAL-BACHE	*	
SECURITIES, INC., et al.	*	

O R D E R

Upon consideration of the plaintiff's petition for rehearing, re-designated as a motion to alter or amend the judgment, it is this 1st day of September, 1988, by the United States District Court for the District of Maryland, ORDERED:

1. That the plaintiff's motion to alter or amend the judgment BE, and the same hereby IS, DENIED; and

2. That the Clerk of the Court shall mail a copy of this Order to the parties.

Herbert F. Murray

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

FRIEDA MILLER :

v. : CIVIL NO. EM-85-4264

PRUDENTIAL-BACHE SECURITIES, INC., ET AL. :

.....

M E M O R A N D U M

In this action, the Plaintiff, Frieda Miller, seeks to set aside an arbitration award in facor of the defendants, Prudential-Bache Securities, Inc. ("bache"), and Samuel Kaplan, a Bache account executive. A motion of the defendents to dismiss filed on November 1, 1985 (Paper No. 4) was denied by this Court on July 21, 1986 (Paper No. 11). A scheduling order was entered on October 15, 1986 (Paper No. 13) which, among other things, directed that the parties complete all discovery by January 25, 1987. The

defendents filed a second motion to dismiss on November 5, 1986 (Paper No. 15), a motion for a protective order on November 26, 1986 (Paper No. 17), and a motion for summary judgment on February 10, 1987 (Paper No. 19). For her part, the plaintiff filed memoranda in opposition to these motions (Paper Nos. 16, 18, 20, and 22) and in addition moved to compel the production of documents (Paper No. 18). By an order entered on January 13, 1988 (Paper No. 24), the Court referred these pending matters to the Magistrate for a Report and Recommendation.

Magistrate Blake filed a Report and Recommendation on April 26, 1988 (Paper No. 25), which recommends that the Court enter summary judgment for the defendants. The plaintiff filed timely objections to this Report and Recommendation (Paper No. 26), the defendants filed a memorandum in support of it (Paper No. 27), and plaintiff filed an additional response (Paper No. 28).

The Court has conducted a de novo review of the record and is now prepared to rule on the matter. No oral hearing is necessary. A brief overview of the facts of this case is in order.

In October 1976 the plaintiff entered into a written "customer agreement" with Bache for investment in so-called "naked options". The agreement provided that disputes arising out of the plaintiff's investment accounts with Bache were to be submitted to arbitration. The agreement also stipulated that its provisions were governed by New York law.

In 1983, Ms. Miller filed a claim against the defendants with the National Association of Securities Dealers ("NASD"). She alleged that losses of over one million dollars that she sustained while investing in naked options in 1978 were caused by fraud on the part of the defendants. Her claim was based in part on alleged violations of & 10(b) of

the Securities Exchange Act of 1934, 15 U.S.C. & 78j(b).

For the convenience of the parties, the NASD arbitration panel conducted hearings in Maryland, though NASD is officially situated in New York. The arbitrators never reached the merits of the plaintiff's claim because they determined that it was barred by the Maryland statute of limitations, which provides that a claim such as the plaintiff's must be brought within three years after the cause of action accrued. See Md. Cts. & Jud. Proc. Code Ann. & 5-101. The arbitrators apparently reached this conclusion by applying New York's so-called "borrowing statute," which provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued in favor of a

> resident of the state the time limited by the laws of the state shall apply.

N.Y. CPLR & 202. Because the plaintiff is a Maryland resident and her claim accrued in Maryland, her claim is within the terms of N.Y. CPLR & 202 and thus subject to Maryland's statute of limitations if the borrowing statute is applicable.

In this Court, the plaintiff seeks to vacate the decision of the NASD arbitration panel and posts several grounds for this relief. First, the plaintiff claims that the arbitration panel exceeded the scope of its authority by applying the Maryland statute of limitations to her claim pursuant to New York's borrowing statute. She contends that the provision in the customer agreement stipulating that the contract was governed by New York law was not intended to include the borrowing statute.

Second, the plaintiff contends that

the agreement to arbitrate is void because it effects a waiver of rights she had under the 1934 Act. Specifically, she contends that because arbitration was, by the terms of the customer agreement, to be conducted in accordance with the rules of the arbitration forum, and because the rules of the NASD purportedly do not extend to her the protection of anti-fraud regulations promulgated by the stock exchanges--pursuant to directive of the 1934 Act--on which she traded options, the arbitration clause effectively waived compliance with a provision of the 1934 Act. Such a waiver, the plaintiff suggests, renders the arbitration clause void under 15 U.S.C. & 78cc(a), which declares void an "provision binding any person to waive compliance with any provision of [the 1934 Act]."

Finally, the plaintiff argues that there was fraud in the inducement of the arbitration clause, rendering it void. Specifically, she cites the defendants'

failure "to advise Petitioner of the Wilko doctrine, the rules of the Option Exchanges, and their arbitration facilities, and the NASD. . . ." Application and Notice to Vacate Arbitrator's Award (Paper No. 1), at 9.

The defendants' motion for summary judgment contends that this Court lacks subject-matter jurisdiction to hear this case and that in any event there are insufficient grounds to set aside the arbitrator's award.

The Court will consider each of these matters in turn.

I

The United States Supreme Court has noted that the Federal Arbitration Act, 9 U.S.C. & 1 et sec., "is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. & 1331 (1976 ed.,

Supp. V) or otherwise." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). A plaintiff seeking to vacate an award under 9 U.S.C. & 10 must establish a basis for federal jurisdiction independent of the arbitration agreement. Sine v. Local #992, 644 F.2d 997, 1001 n.9 (4th Cir. 1981).

The plaintiff has cited two bases for the Court's jurisdiction in this case. Diversity of citizenship, 28 U.S.C. & 1332, and federal question, 28 U.S.C. & 1331, in that her claim is one to enforce the 1934 Act. See 15 U.S.C. & 78aa. The Magistrate correctly determine there is no diversity jurisdiction here. The defendant, Samuel Kaplan, contends that he is a Maryland citizen and thus is not diverse with respect to the plaintiff. Because complete diversity of citizenship is required, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), jurisdiction cannot be premised on 28 U.S.C. & 1332. There

is an independent basis for federal question jurisdiction, however. The underlying dispute in this matter concerns alleged violations of & 10(b) of the 1934 Act, 15 U.S.C. & 78j(b). Thus, there is federal-question jurisdiction notwithstanding the fact that the claim was first submitted to arbitration rather than brought here in the first instance. See Kerr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283, 1288 (9th Cir. 1984) (implicit suggestion that motion to compel arbitration could be heard in federal court on basis of underlying federal-question dispute).

II

Under 9 U.S.C. & 10, a district court may set aside an award under the following circumstances:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators,

or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Supreme Court has also suggested that manifest disregard of the applicable law may be an additional basis upon which to vacate an arbitrator's award. See Wilko v. Swan, 346 U.S. 427, 436-37 (1953).

Ms. Miller relies on § 10(d) of the

Arbitration Act. She claims that the arbitrators exceeded their authority when they applied Maryland's three-year statute of limitations. She reasons that the parties contemplated that the arbitration panel would apply its own procedural rules to the case and that the stipulation that the customer agreement was to be governed by New York law was not intended to include the borrowing statute.

The NASD's rules allow six years to commence arbitration provided "no extension of applicable statutes of limitations occurs." Thus, the six-year period under the NASD rules applies only if no applicable limitations statute would be extended. Obviously, if the NASD panel determined that Maryland's three-year limitation statute was applicable, then that time period would control. The Court sees no basis for the contention that the arbitrators exceeded their authority by determining that the Maryland statute applied to her claim. The plaintiff may

disagree with the arbitrators' determination in that regard but that does not amount to grounds for vacating an award under 9 U.S.C. & 10(d). National R.R. Pass. Corp. v. Chesapeake & Ohio Org., 551 F.2d 136, 142 (7th Cir. 1977) (arbitrators doe not exceed their powers by misconstruing a contract). Certainly it was well within the scope of the arbitrators' authority to decide that New York's borrowing statute was comprised in the submission of disputes to New York law. See id. at 140 (claims that arbitrators exceeded authority should be narrowly construed). Moreover, it is not even clear that the arbitrators took that route. They could also have decided that because the hearings were conducted in Maryland and concerned a claim that arose in Maryland and was brought by a Maryland resident, the claim was subject to the Maryland statute of limitations even without reference to the borrowing statute. The Court is unpersuaded by the plaintiff's arguments that

the NASD panel exceeded its authority in applying Maryland's three-year statute of limitations. Nor can the Court find any basis for a contention that the panel's decision evinced a manifest disregard of applicable law. As the Magistrate pointed out, the application of the New York borrowing statute, and therefore Maryland's three-year limitation period, appears to be supported by Second Circuit case law. See Stafford v. International Harvester Co., 668 F.2d 142, 148 (2d Cir. 1981) (borrowing statute applies to nonresident plaintiff if cause of action accrued outside of New York and the limitations period of the jurisdiction in which the cause of action accrued would bar the action); Arneil v. Ramsey, 550 F.2d 774, 779-80 (2d Cir. 1977) (where federal claim for relief is the principal one asserted, New York's interest is in the application of its borrowing statute); Bache Halsey Stuart Inc. v. Namm, 446 F. Supp. 692, 694 (S.D.N.Y. 1978) (New York's borrowing statute

refers to a foreign state's limitation period only if cause of action accrues in favor of a non-resident of New York). In short, there is nothing about the arbitrators' decision that may be properly disturbed in this forum, barring a determination that the agreement to arbitrate is itself void.

III

In the recent case of Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987), the Supreme Court ruled that agreements to arbitrate disputes arising under the 1934 Act are enforceable "where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate [1934 Act] rights. . . ." Id. at 2343. The plaintiff contends that McMahon does not preclude a finding that the arbitration clause is void under 15 U.S.C. & 78cc(a) as a waiver of compliance with any provision of the 1934 Act. To the contrary, she contends that in her case the arbitration clause effectively waived her

substantive rights to the protection of the anti-fraud rules the exchanges are required to promulgate under the 1934 Act. According to the plaintiff, the test under McMahon is whether the arbitration clause weakens a party's ability to recover under the 1934 Act, and that the arbitration clause does so in this case by failing expressly to provide that arbitration would be conducted in accordance with the anti-fraud provisions of the Chicago Board of Options Exchange and the Philadelphia Options Exchange.

Section 78f (b) (5) of Title 15 provides:

> (b) An exchange shall not be registered as a national securities exchange unless the Commission determines that--
>
> . . . .
>
> (5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade,

to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.

Section 78cc(a) of Title 15 provides:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

The transaction that gave rise to the underlying dispute in this case took place on the Chicago and Philadelphia option exchanges. Rule 9.7(c) of the Chicago exchange provides:

> Within 15 days after a customer's account has been approved for options transactions, a member organization shall obtain from the customer a written agreement that the account shall be handled in accordance with the Rules of the Exchange and

> and the Rules of the Clearing Corporation and that such customer, acting alone or in concert with others, will not violate the position or exercise limits set forth in Rules 4.11 and 4.12.[1]

The plaintiff contends that because the arbitration clause did not expressly provide that disputes would be handled in accordance with the anti-fraud rules of the options exchanges, it amounted to a waiver of her right to the protection of 15 U.S.C. & 78f(b)(5), which requires the promulgation of these rules.

The arbitration clause provides, in pertinent part:

> Any controversy arising out

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[1] The plaintiff contends that the Philadelphia Option Exchange has similar rules.

of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed within or outisde of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United

> States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect.

The plaintiff chose to file her dispute with the National Association of Securities Dealers (NASD). The NASD has its own anti-fraud provisions, set forth in Appendix E of the NASD Manual--Rules of Fair Practice. The applicability provision of these rules provides:

> The Rules in this Appendix E shall be applicable (1) to the extent appropriate unless otherwise stated herein, to the conduct of accounts, the execution of transactions, and the handling of orders in exchange listed options by members who are not members of an exchange on which the option executed is

> listed; (2) to the extent appropriate unless otherwise stated, herein, to the conduct of accounts, the execution of transactions, and the handling of orders in conventional options; and (3) other matters related to options trading.

The plaintiff contends that because Bache is a member of the Chicago and Philadelphia option exchanges, the NASD anti-fraud rules are not applicable to her claims. And because the arbitration clause provides that the arbitration shall be handled in accordance with the rules of the arbitration forum--in her case the NASD-- she is left without the protection of the Chicago and Philadelphia exchanges' anti-fraud rules as well.

The Court agrees with the plaintiff that McMahon does not render all agreements to arbitrate controversies arising under the 1934 Act per se valid. If arbitration

cannot adequately vindicate her substantive 1934 Act rights, then the clause may be void. This is not such a case, however. The Court is unpersuaded that arbitration was inadequate to enforce whatever right the plaintiff may have had under the 1934 Act.

There are a number of fatal falws in plaintiff's arguments.

The Court may assume that the anti-fraud rules were adopted for the purpose of protecting customers such as the plaintiff[2] but there is nothing in the arbitration clause that operates as a waiver of the protection of those rules. The provision that arbitration forum is self-evidently one governing arbitration

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[2] It seems clear, however, that the rules were also intended to prevent fraud by the customer. rule 9.7(c) of the CBOE, for example, speaks in terms of obtaining an agreement that the "customer, acting alone or in concert with others, will not violate the position or exercise limits set forth in Rules 4.11 and 4.12."

procedure, not the substantive rules that may bear on the merits of the underlying dispute. If the conduct of Bache violated the anti-fraud provisions of the Chicago or Philadelphia option exchanges, that is a matter that could have been considered by an arbitration panel in passing on the merits of plaintiff's claim.

The fact that the NASD anti-fraud rules may not have applied to Bache because of its membership on the Chicago and Philadelphia exchanges is beside the point. The plaintiff has pointed to nothing to indicate that an NASD arbitration panel is precluded by its procedural rules from considering the Chicago and Philadelphia anti-fraud when passing on a claim.

Moreover, the arbitration clause expressly provides for arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Govenors of the New York Stock Exchange . . . " The

plaintiff has suggested no basis for finding that the rules of the American Arbitration Association or the Board of Govenors of the New York Stock Exchange would have the same effect on her right to protection of the option exchange rules that she ascribes the the NASD rules. thus, neither the arbitration clause as originally written nor the subsequent agreement to submit the dispute to the NASD operated as a waiver of plaintiff's right to the protection of the anti-fraud rules.

The plaintiff also contends that the arbitration clause is void on account of fraud in the inducement. The basis of this claim is that Bache failed to advise her of the

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[3] The plaintiff apparently chose--and Bache acquiesced in the choice--the NASD forum notwithstanding the lack of any provision in the arbitration clause that this was an available forum.

Wilko doctrine, the rles of the options exchanges and their arbitration facilities, and the NASD. She has sought discovery to gather evidence of these alledged wrongdoings through a motion to compel production of documents.

The "Wilko doctrine" is a reference to Wilko v. Swan, 346 U.S. 427 (1953), in which the Supreme Court held that predispute agreements to arbitrate a claim arising under the Securities Act of 1933 ("the 1933 Act") are enforceable. The applicability of Wilko to claims arising under the 1934 Act has been in doubt since 1974 (two years before the plaintiff signed the customer agreement containing the arbitration clause in this case) when the Supreme Court upheld in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the enforcement of a predispute agreement to arbitrate 1934 Act claims by parties to an international contract. As noted above, the Supreme Court finally settled the matter in Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332

(1987) (holding that predispute agreements to arbitrate are permissible when arbitration is sufficient to vindicate 1934 Act rights). The Court can find no basis for plaintiff's contention that Bache's failure to advise her about the Wilko case is grounds for a fraudulent inducement claim. Even accepting for the sake of argument the dubious proposition that Bache was required to provide the plaintiff with what amounts to legal advice,[4] there was no duty to advise her of a legal doctrine whose applicability to her circumstances was at least questionable.

Nor can the Court find any authority to support the plaintiff's contention that

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[4] Cf. Guadano v. Long Island Plastic Surgical Group, P.C., 607 F. Supp. 136, 139 (E.D.N.Y. 1982) (defenant medical practice not required to urge or advise patient to seek legal advice before contracting to submit disputes to arbitration).

Bache was required to advise her about the existence of the NASD, the rules of the options exchanges and their arbitration facilities. The plaintiff also fails to explain how this information, if provided to her, would have affected her decision to agree to arbitration.

Finally, the plaintiff chose the NASD forum for arbitrating her dispute. This was not one of the forums set forth in the customer agreement's arbitration clause. It is therefore difficult to perceive how she was fraudulently induced to submit to arbitration before the NASD panel when she elected it.[5]

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[5] Furthermore, since the original agreement did not include the NASD as a possible forum, the submissions to that body after the dispute arose can be considered a separate arbitration agreement from the one in the written contract. "If, once a controversy has arisen, a party voluntarily submits or agrees to submit to arbitration, he is bound by his decision." Fischer v. New York Stock Exchange, 408 F. Supp. 745, 749 (S.D.N.Y. 1976).

Ordinarily, summary judgment is inappropriate when a party opposing the motion has had an inadequate opportunity to discover evidence. See F. R. Civ. P. 56(f). See also generally 10A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure & 2741 (1983). In this case, however, the facts for which the plaintiff seeks evidence through the discovery process are immaterial. The Court may assume that Bache never advised the plaintiff of the Wilko doctrine, the NASD, and the option exchanges' rules and arbitration facilities. These omissions on Bache's part are not sufficient to support a claim of fraud in the inducement of the arbitration clause. Where the facts sought through discovery are irrelevant to the issues to be adjudicated, summary judgment need not be delayed. See generally 10A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure & 2741, at 558-60 (1983).[6]

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[6] It should be noted that in a paper styled

as "Plaintiff's First Supplement to Its Response to Defendants' Motion for Summary Judgment," the plaintiff alleged for the first time that "there was an evident partiality demonstrated by the NASD when it failed to investigate alleged violations of NASD by-laws enforcing federal anti-fraud provisions." The Magistrate did not specifcially address this contention in her Report and Recommendation and the plaintiff failed to specifcially object to this omission in her Objections to Magistrate's Recommendation. Therefore, this issue is not before the Court. Furthermore, it is not surprising that the NASD did not investigate alleged violations of NASD by-laws enforcing federal anti-fraud provisions in light of the arbitrators' decision that Ms. Miller's claims were barred by the statute of limitations.

Because there are no genuine issues as to any material fact and the only issues are legal ones, summary jugment is an appropriate

vehicle for disposing of this case. The Court finds that Bache is entitled to judgment as a matter of law and therefore will adopt the Magistrate's recommendation that summary judgment be entered for Bache.

Dated: July 22, 1988

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In The Matter of Arbitration:	:	
FRIEDA MILLER	:	
	:	
v.	:	CIVIL NO. HM-85-4264
	:	
PRUDENTIAL BACHE SECURITIES,	:	
INC. and SAMUEL KAPLAN	:	
	:	

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MAGISTRATE'S REPORT AND RECOMMENDATION

On October 17, 1985, the plaintiff, Frieda Miller, filed an Application and Notice to Vacate Arbitrator's Award to set aside an arbitration decision rendered by the National Association of Securities Dealers (NASD) on July 24, 1985. The NASD had determined that Ms. Miller's claim against Prudential Bache Securities, Inc. and Samuel Kaplan, alleging fraudulent dealings in connection with the trading of "naked options," was barred by the statute of limitations. On November 1, 1985, the defendants filed a Motion to Dismiss on the basis of lack of subject matter jurisdiction. That motion was denied by the Court on July 21, 1986.

On November 5, 1986, the defendants filed a second motion to dismiss, which was opposed by the plaintiff. On November 26, 1986, the defendants filed a motion for protective order in connection with discovery requests. The plaintiff opposed that motion and filed a motion to compel production. On February 10, 1987, the defendants filed a motion for summary judgment. The plaintiff filed a response and the defendants filed a reply to that response. Subsequently, the plaintiff filed a supplement to her response and the defendants responded to the supplement.

On January 13, 1988, the case was referred to the undersigned Magistrate for a report and recommendation concerning all pending motions. For the reasons stated below, I will recommend that the defendants' motion for summary judgment be granted and that the defendants' motion to dismiss, the defendants' motion for a protective order, and the plaintiff's motion to compel production of documents,

be dismissed as moot.

Facts

On October 7, 1976, Ms. Miller, a Maryland resident, and Prudential Bache Securities, Inc. (hereinafter "Bache") entered into a written agreement concerning Ms. Miller's securities account with Bache. The contract contained an arbitration clause, providing in part that the contract should be governed by the laws of the State of New York. According to Ms. Miller, in May 1978 she sustained a loss of over one million dollars "which arose out of a controversy governed by the arbitration clause of the contract." (Application and Notice to Vacate Arbitrator's Award, par. 6.) Ms. Miller claimed that she was never advised by Bache or Samuel Kaplan, the local account executive handling her transactions, of the risks involved in option trading. She also claimed that Bache induced her to engage in such trading through "...intentional and fraudulent misrepresentations

and omissions of material facts..." (Id. at par. 9).

Apparently, Ms. Miller consulted the Securities and Exchange Commission in September 1983 and was at that time advised of the availability of the NASD as a possible arbitration forum.[1] In October 1983 Ms. Miller filed a claim with the NASD in New York City. The NASD held a hearing in Baltimore on June 24, 1985, after which a five-member panel (including three lawyers) granted the motion of Bache to dismiss on the grounds that Ms. Miller's claim was barred by the statute of limitations.

The arbitrators' decision does not set forth the reasons for their determination

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[1] The arbitration clause in the agreement she signed with Bache did not specify the particular entity that should conduct the arbitration.

that Ms. Miller's claims were barred by the statute of limitations. (Motion for Summary Judgment, Exhibit A). It appears from the motion to dismiss filed by Bache that the NASD accepted Bache's argument that the New York "borrowing stattute applied to Ms. Miller's claim. As noted above, the arbitration clause provided that New York law would control the contract. New York law provides that a suit brought by a non-resident based upon a cause of action accruing outside New York state could not be commenced after the expiration of the statute of limitations applied by the state where the cause of action accrued. N.Y. CPLR &202. Bache, therefore, argued that the Maryland one-year and three-year statutes of limitations on securities fraud actions apolied to bar Ms. Miller's claim.[2]

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[2] In Maryland, a one-year statute of limitations is applied to actions under Section 10(b) [15 U.S.C. &78j(b)], and a three-year

Miller argued that New York's six-year statute of limitations applicable to claims of fraud and deceit should apply.

Ms. Miller filed her Application and Notice to Vacate Arbitrator's Award on October 17, 1985, under the provisions of 9 U.S.C. &10. She claimed that the court had jurisdiction under the Federal Arbitration Act, 9 U.S.C. &1 et seq., and under 28 U.S.C. &1332 as a diversity action in which the amount in controversy exceeded $10,000. In a later filed Memorandum in support of the application, Ms. Miller argued that the decision should be vacated because (1) the award was the result of a manifest disregard of applicable law, (2) the NASD acted with bias and misused its power, (3) the claim was nonarbitrable under federal securities law, and (4) the arbitration clause was fraudulently induced.

The initial Motion to Dismiss filed

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cert. denied, 449 U.S. 1124 (1981).

by Bache and Kaplan argued that the Federal Arbitration Act does not confer jurisdiction on this court and that Ms. Miller had failed to establish an independent basis for jurisdiction. Bache pointed out that Mr. Kaplan's residence, as indicted on the certificate of service attached to Ms. Miller's initial Application, was in Maryland. Ms. Miller also is a Maryland resident.

Ms. Miller's answer to that motion asserted jurisdiction under the Federal Arbitration Act and also under 15 U.S.C. &78aa for violation of federal securities statutes including 15 U.S.C. &78j(b). That initial motion was denied by letter order on July 21, 1986.

On November 5, 1986, Bache filed a second Motion to Dismiss the Application, arguing that Ms. Miller had failed to allege grounds which were reviewable by this Court under 9 U.S.C. &10 and requesting reconsideration of its motion to dismiss on the grounds that Ms. Miller had failed to establish an independent

basis for federal jurisdiction. Ms. Miller filed an opposition. While that motion was pending, Ms. Miller filed a request for production of documents and Bache responded with a motion for production of documents and Bache responded with a motion for protective order. On December 3, 1986, Ms. Miller filed an opposition to the motion for protective order accompanied by a motion to compel production of documents.

On February 10, 1987, Bache and Kaplan filed a motion for summary judgment. In it, they argue that this Court lacks subject matter jurisdiction, that the plaintiff has shown no grounds permitting vacation of the award uner 9 U.S.C. &10 and that there was ample legal support for the arbitrators' decision. The motion was supported by several exhibits. On February 25, 1987, the plaintiff filed a response also supported by exhibits. She did not attempt to point out any material facts in dispute, but rather relied on legal argument.

Law

I. Subject Matter Jurisdiction

Bache and Kaplan correctly argue that the Federal Arbitration Act, 9 U.S.C. &1 et seq., does not confer independent federal jurisdiction over an action brought thereunder. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 n.32 (1983), affirming, In Re Mercury Construction Corp., 656 F.2d 933, 938 (4th Cir. 1981); Kehr v. Smith Barney, Harris Upham, & Co., 736 F.2d 1283, 1287 (9th Cir. 1984). The Fourth Circuit has stated that a plaintiff seeking to vacate an award under 9 U.S.C. &10, like a plaintiff seeking to compel arbitration under 9 U.S.C. &4, must establish a basis under which the disctrict court would have jurisdiction over the action under Title 28, independent of the arbitration agreement. Sine v. Local #922, 644 F.2d 997, 1001 n.9 (4th Cir. 1981).

Bache also correctly argues that Ms. Miller has failed to establish a basis for

jurisdiction under 28 U.S.C. &1332 because that statute requires complete diversity between all plaintiffs and defendants. Kehr v. Smith Barney, supra, 736 F.2d at 1288 (no diversity jurisdiction because the plaintiff was a California resident as were the two employees of Smith Barney included as defendants in the case). Ms. Miller has not refuted the defendants' argument that Samual Kaplan, like Ms. Miller, resides in Maryland.

This Court, however, would have federal question jurisdiction of an action arising under &10(b) of the Securities Exchange Act of 1934, 15 U.S.C. &78j(b). While Ms. Miller's claim was presented for arbitration in the first instance rather than brought in the form of a suit alleging specific causes of action, the defendants appear to recognize that her allegations could be considered a claim for violation of &10(b). (See, Motion for Summary Judgment at 10). Ms. Miller asserted that basis for jurisdiction in her

Answer to Bache's Motion to Dismiss. Cf., Kehr v. Smith Barney, supra (Kehr sued Smith Barney for violations of &10(b) for improperly involving her in options transactions where she could not understand the risk). Accordingly, summary judgment or dismissal on the basis of lack of subject matter jurisdiction will not be recommended.

II. Judicial Review of Arbitration Award

Judicial review of an arbitration decision is severely limited. Section 10 of the Federal Arbitration Act provides that the district court may vacate an award:

a) Where the award was procured by corruption, fraud, or undue means.

b) Where there was evident partiality or corruption in the arbitrators, or either of them.

c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in

refusing to hear evidence pertinent and material to the controversy: or of any other misbehavior by which the rights of any party have been prejudiced.

d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Supreme Court has suggested as an additional ground for judicial review "manifest disregard" of the applicable law. Wilko v. Swan, 346 U.S. 427, 436-437 (1953) (dictum). Other courts have accepted the "manifest disregard" standard. See, e.g., Sheet Metal Workers International Association v. Kinney Air Conditioning Company, 756 F.2d 742, 746 (9th Cir. 1985) (Kennedy, J.) ("Independent of Section 10 of the Act, a district court may vacate an arbitral award which exhibits manifest disregard

of the law.") Cf. Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 749-750 (8th Cir. 1986) (reciting but not adopting the 'manifest disregard' standard), cert. denied, 476 U.S. 1141 (1986). That standard must be "severely limited", however, to avoid frustrating the purposes of the Arbitration Act. Office of Supply, Government of the Republic of Korea v. New York Navigation Company, Inc., 469 F.2d 377, 379-380 (2d Cir. 1972); Sidarma Societe Italiana, Etc. v. Holt Marine Industries, Inc., 515 F.Supp. 1306 (S.D.N.Y.), aff'd. without opinion 681 F.2d 802 (2d Cir. 1981). The plaintiff must show more than an erroneous interpretation of the law. There must be a showing of manifest disregard, i.e., that the arbitrators knew and understood the law but disregarded it in reaching their decision. Wilko v. Swan, supra, 346 U.S. at 436-437; Stroh Container Company v. Delphi, supra, 783 F.2d at 750;

Fairchild & Company, Inc. v. Richmond, F&PR Co., 516 F.Supp. 1305, 1315 (D.DC 1981); Sidarma Societe v. Holt Marine, supra, 515 F.Supp at 1308-1309; Dundas Shipping & Trading Co. v. Stravelakis Bros., 508 F.Supp. 1000, 1003-1004 (S.D.N.Y. 1981). As the Court stated in Wilko, "...interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. at 436-437. The arbitrators are not required to explain their reasoning in their written decision, moreover, and a lack of such explanation is not sufficient in itself to allow the court to substitute its own judgment. Stroh Container Co. v. Delphi, supra, 783 F.2d at 749-750 (rejecting argument that arbitrators disregarded law in applying applicable state statute of limitations).

Despite the variety of language employed by Ms. Miller to describe her claim, it appears

upon examination to be nothing more than an argument that the arbitrators incorrectly interpreted the law applicable to the contract between the parties in choosing to apply Maryland's statute of limitations. Ms. Miller contends that the clause stating the contract would be governed by the laws of the state of New York meant that the New York six-year statute of limitations would apply. Bache responds that the applicable laws of New York include the New York borrowing provision which would apply the shorter limitations period of the state where the cause of action arose. Bache's argument is not clearly erroneous and indeed appears to be supported by Second Circuit case law. See, Stafford v. International Harvester Co., 668 F.2d 142 (2d Cir. 1981); Arneil v. Ramsey, 550 F.2d 774, 779-780 (2d Cir. 1977); Bache Halsey Stuart Inc. v. Namm, 446 F.Supp. 692 (S.D.N.Y. 1978). Ms. Miller has offered no evidence that the arbitrators acted in manifest disregard of the law or

that they abused their power in any way.

Ms. Miller also argues that her federal securities claim is nonarbitrable and that therefore the NASD should have refused her request for arbitration. Even assuming that the nonarbitrability doctine adopted in Wilko v. Swan, supra, applies to a plaintiff who requested arbitration, as opposed to one resisting a motion to compel arbitration, it is now settled that claims arising under 10(b) of the Securities Exchange Act of 1934 may be subject to arbitration even though claims arising under the Securities Act of 1933 are not. Shearson/American Express, Inc. v. McMahon, ____ U.S. ____, 107 S.Ct. 2332, 2341-2342 (1987). See also, Fisher v. Prudential-Bache Securities, Inc., 635 F.Supp. 234, 236 (D.Md. 1986) aff'd. in part, rev'd. in part, without opinion, 831 F.2d 290 (4th Cir. 1987); Shotto v. Laub, 632 F.Supp. 516, 526 (D.Md. 1986).

III. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that:

> [Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As recently stated by the Supreme Court, this does not mean that any factual dispute will defeat the motion:

> By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is

that there be no genuine issue of material fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (emphasis in original). Moreover, the Supreme Court has explained that the Rule 56(c) standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a): "...there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., supra, 477 U.S. 242, 106 S.Ct. at 2511; White v. Rockingham Radiologists, Ltd., 820 F.2d. 98, 101 (4th Cir. 1987). See also Celotex Corportation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986).

The plaintiff in this case has demonstrated no geniune dispute as to any material fact. The defendents appear entitled to judgment as a matter of law. Accordingly, for the

reasons stated above, it is hereby recommended that the defendants' Motion for Summary Judgment be GRANTED, and the remaining motions be DISMISSED as moot.

_____
DATE

_____
CATHERINE C. BLAKE
UNITED STATES MAGISTRATE

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between FRIEDA LAPIDUS MILLER vs. Claimant PRUDENTIAL BACHE SECURITIES, INC. AND SAMUEL KAPLAN Respondents	DECISION #84-018

The undersigned, being the arbitrators selected to hear and determine a matter in controversy between the above-mentioned Claimant and Respondents set forth in a submission to arbitration signed by the Parties on December 20, 1983, March 2, 1984 and July 22, 1985 respectively;

And, having heard and considered the proofs of the parties including the Amended Statement of Claim, Motion to Dismiss, Response to the Motion and oral argument of the parties at a hearing conducted on June 24, 1985, the Panel has decided and determined that the Respondent's Motion to Dismiss shall be granted in that the claims of the Claimant are barred by the statutue of limitations;

And, the $550 filing fee previously deposited by the Claimant with the NASD, Inc. shall be refunded to her.

Barent L. Fake, Esq.

Aline Ryan, Esq.

Robert Kent, Esq.

Dated July 24, 1985

E.H. Price Green

William W. Knobloch